

December 9, 2002

Ms=2E Marlene H=2E Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Notice of Proposed Rulemaking
CC Docket No=2E 92-90

Dear Ms=2E Dortch:

Discover Bank is pleased to respond to the Federal Communications Commission's Notice of Proposed Rulemaking regarding the regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA")=2E We appreciate the opportunity to comment=2E

Discover Bank maintains total assets in excess of \$22 billion and is among the nation's largest issuers of general-purpose credit cards, as measured by number of accounts and Cardmembers=2E Discover Bank also offers deposit account services to customers across the country, and holds over \$13 billion in consumer deposits=2E Discover Bank, through an affiliate and through unaffiliated telemarketing firms, places telemarketing calls to its own customers, as well as to prospective customers=2E

1=2E Discover Bank Can Support the FCC's Proposed National "Do-Not-Call List" Only If Congress First Preempts State Regulation of Interstate and Intrastate Calls

Discover Bank strongly supports the right of consumers who do not wish to receive telemarketing calls to exercise that choice=2E Telemarketers are currently subject to two sets of federal regulations dealing with do-not-call requests: the existing Telemarketing Sales Rule and the FCC's rule implementing the Telephone Consumer Protection Act of 1991=2E In addition, telemarketers must comply with

numerous state laws
dealing with do-not-call requests, some of which establish state-enforced
do-not-call lists=2E
The proliferation of these state do-not-call lists is making compliance
an
increasingly
complicated and costly endeavor for telemarketers=2E

We believe that this issue is particularly suitable for a uniform
national standard
that would preempt state laws with respect to interstate and intrastate
calls and that the
FCC rather than the FTC is the proper agency to create that standard=2E

Congress has
already granted the FCC authority to create and maintain a national
do-not-call list, and
Congress has preempted state regulation of interstate telemarketing calls=2E
Congress'
failure to preempt state regulation of intrastate calls, however, means
that firms engaging
in both interstate and intrastate calls must contend with a tangle of
overlapping and
inconsistent federal and state requirements=2E A new national list without
federal
preemption regarding interstate and intrastate telemarketing calls would
simply
complicate matters further for consumers and telemarketers and, therefore,
Discover
Bank cannot support such a list=2E

a=2E We Believe State Regulation of Interstate Telemarketing Is
Already
Preempted

The Communications Act of 1934 preempts state "do-not-call" laws that
by their
terms apply to calls made in interstate commerce=2E The Act specifically
reserves authority
over interstate communications to the FCC, 47 U=2ES=2EC=2EA=2E =A7 152(a), while
reserving to the
states regulation of intrastate communications, 47 U=2ES=2EC=2EA=2E =A7 152(b)=2E The
legislative
history of the amendments to the Act made by the Telephone Consumer
Protection Act of
1991, 47 U=2ES=2EC=2EA=2E =A7 227, further indicate a Congressional intent

ent to preempt
state laws
that regulate interstate communications, while leaving in place state laws
that provide
greater consumer protection in intrastate communications=2E See, e=2Eg
=2E, House
Rep=2E No=2E 317,
102d Cong=2E (1991)=2E The most direct statement on preemption of the
TCPA was
made in
the Senate by Senator Hollings, then Chairman of the Senate Committee on
Commerce,
Science and Transportation and the original sponsor and driving force
behind the
enactment of the TCPA=2E While explaining the reasoning behind various
provisions,
Senator Hollings said: "Section 227(e)(1) clarifies that the bill is not
intended to preempt
State authority regarding intrastate communications except with respect
to
the technical
standards under section 227(d) and subject to section 227(e)2)=2E Pursuant
to the general
preemptive effect of the Communications Act of 1934, state regulation of
interstate
communications, including interstate communications initiated for
telemarketing
purposes, is preempted=2E" 137 Cong=2E Rec=2E 17,874 (1991) (emphasis
added)=2E

There is also ample case law support for preemption=2E For example,
prior Supreme
Court decisions found occupation of the field and thus preemption of state
laws that
purported to impose substantive restrictions on interstate telegraph and
telegram
transmissions=2E Western Union Co=2E v=2E Boegli, 251 U=2ES=2E 315 (1920); Postal
Telegraph &
Cable Co=2E v=2E Warren Goodwin Lumber Co=2E, 251 U=2ES=2E 27 (1919)=2E
There are also
analogous cases in the Circuit Courts that find in favor of preemption=2E

See, e=2Eg=2E, Ivy
Broadcasting Co=2E v=2E AT&T, 391 F=2E2d 486 (2d Cir=2E 1968)=2E The United States
Supreme
Court later acknowledged that the Communications Act of 1934 "is a

comprehensive
scheme for the regulation of interstate communications=2E" Benanti v=2E
United
States, 355
U=2ES=2E 96, 104 (1957)=2E In addition, there is also FCC precedent co
nfirning
preemption=2E In
1991, the FCC issued a release stating that interstate and foreign
communications are
totally entrusted to the FCC=2E FCC Release No=2E 91-185 (1991)=2E In
terpretive
letters issued
by the FCC staff conclude that state "do-not-call" laws are preempted=2E
See
Letter dated
Jan=2E 26, 1998 from Geraldine A=2E Matise, FCC, to Ronald A=2E Guns, M
aryland
House of
Delegates and letter dated March 3, 1998 from Geraldine A=2E Matise, FC
C, to
Sanford L=2E
Schenberg=2E The FCC should use this opportunity to reaffirm federal
preemption in the
area of interstate telemarketing calls and, as discussed above, obtain
preemption authority
from Congress with respect to intrastate calls=2E

b=2E Calls to Persons With Whom There is a Prior or Existing Bus
iness
Relationship Should be Exempt

The TCPA's definition of "telephone solicitation" excludes calls t
o
persons with
whom the caller has an existing business relationship, and thus any rul
es
regarding a
national list should explicitly reflect that such calls are exempted=2E

While the states have
taken many different approaches in crafting "do-not-call" statutes,
virtually all of them
have exempted calls made to persons with whom the seller has an existin
g
business
relationship=2E Generally, this exemption extends to both existing and
former
customers=2E
There is good reason for such an exemption=2E Consumers benefit when
companies they
already know and trust contact them with offers for other, better or le
ss
expensive
products or services=2E We are not aware of problems that have arisen u
nder
existing state
laws or of consumer demands that the laws be amended to delete the

existing-customer
exception=2E Consumers do not know in advance which of the companies t
hey
already do
business with will have useful offers, so the proposal that consumers w
ho
register on the
list grant express written and oral authorization in advance for
telemarketing calls from
specific companies is not helpful to consumers or telemarketers=2E Dis
cover
Bank's
practice, which we believe is widely shared, of allowing customers to
proactively add
themselves to its internal do-not-call list also makes it unnecessary t
o
further regulate
calls to our customers=2E

2=2E Discover Bank Supports Making Company-Specific Do-Not-Call Lists

Easier for Consumers

a=2E Proactive Requests from Consumers

The Proposal indicates that the FCC may consider alternative metho
ds
for
allowing consumers to place themselves on a company-specific list, such
as
using the
Internet or mail to submit a proactive request to be placed on a
company-specific list=2E
Discover Bank already provides consumers with the opportunity to make a
proactive
request to be placed on its internal do-not-call list, but is concerned
that any legal
requirement to permit consumers who are not customers to place themselv
es
on a
company-specific list before receiving a telemarketing call would be
extremely difficult
to comply with due to the difficulty of matching names and updating
telephone numbers
of individuals with whom we have no business relationship=2E If compan
ies
were required
to accept proactive requests, they should be permitted to designate how
such requests
must be registered in order to be made effective (e=2Eg=2E at a certain
address, phone number
and/or web site)=2E

The FCC should not require companies to respond to a consumer's request to be placed on a company-specific list=2E Such a requirement would be costly to implement and provide no real benefit to consumers=2E Upon making a request to be placed on a company-specific list, consumers have obvious reason to believe that their request will be implemented=2E If it is not, there are several remedies available, including state enforcement and private rights of action against the telemarketer, depending on the circumstances=2E We do not believe the cost to the industry can be justified=2E

b=2E Time Required to Implement

The FCC has requested comment as to whether consumers may continue to receive calls for some period of time after asking to be placed on a company-specific list=2E Complex processes are used to prepare telemarketing lists and run them against updated do-not-call lists=2E These lists are prepared with the assistance of multiple business units and vendors, and may be used by both in-house callers and outside telemarketing firms=2E Also, telemarketing campaigns frequently last 45-60 days, so that a "good" list could become inaccurate and unusable before a marketing campaign is completed=2E We suggest that companies be given a period of no less than 45 days to remove names from their internal lists=2E

c=2E Consumers with Disabilities

The FCC also requests comment on whether consumers with hearing and speech difficulties are able to convey a request not to be called by telemarketers=2E We are not aware of widespread problems in this regard=2E Discover Bank currently uses a telephone device for the deaf (TDD) and supplies that special telephone number on statements and letters=2E Consumers may use this channel to request not to be called,

and
those requests
are honored=2E Should the FCC determine that it must address this issue, we
suggest that
rather than create new requirements specific to those with disabilities
,
the FCC should
rely upon the implementation of a national do-not-call list as the best
means of mitigating
the difficulties that disabled individuals may face with respect to placing
themselves on a
company-specific list=2E

3=2E Caller Identification Requirements are Impracticable

The Proposal seeks comment on whether telemarketers should be required
to
transmit caller identification information=2E We do not believe this is
feasible or
appropriate=2E Many telemarketers do not use telephone services that are
capable of
transmitting caller ID information=2E We do not believe it would be
appropriate for the
TCPA Rule to be amended in a manner that is not technology neutral,
requiring
telemarketers to use only certain types of telephone service providers=2E

Furthermore, such
a "remedy" would be limited because it would benefit only those consumers
who
subscribe to caller ID services=2E

4=2E Predictive Dialers Improve Calling Efficiency and their Abuse Can Be Controlled

The Proposal seeks comment as to whether a predictive dialer is an
"automatic
telephone dialing system," or "autodialer," for purposes of the TCPA and
TCPA Rule=2E
An autodialer is defined in the TCPA and TCPA Rule as equipment which has
the
capacity to store or produce telephone numbers to be called using a random
or sequential
number generator and to dial such numbers=2E Under the TCPA Rule, an
autodialer may

not be used to initiate a telephone call, with limited exceptions, to a
ny
emergency
telephone line, the telephone line of any hospital guest room, or any
telephone number
assigned to a cellular telephone service or any service for which the
called party is
charged for the call=2E

We do not believe that a predictive dialer falls within the defini
tion
of an
autodialer, nor do we believe there is reason to classify predictive
dialers as such=2E A
predictive dialer does not meet the definition of an autodialer because
a
predictive dialer
generally does not store or generate telephone numbers to be called usi
ng a
random or
sequential number generator=2E Rather, the primary function of a predi
ctive
dialer is to call
a given set of purposefully selected telephone numbers in a manner that

maximizes the
efficiency of telemarketers=2E Furthermore, the TCPA Rule seeks to pre
vent
an autodialer
from randomly calling an emergency line, hospital room, or a telephone
for
which the
called party is charged for the call=2E Predictive dialers are general
ly
used to dial numbers
the telemarketer intends to call, not those randomly generated which ma
y
include hospital
rooms, etc=2E We are unaware of significant problems associated with t
he use
of predictive
dialers in connection with calling these types of restricted telephone
numbers, and
therefore urge the FCC to refrain from classifying a predictive dialer
as
an autodialer=2E

The FCC has requested comment as to the proper regulation of aband
oned
calls
from predictive dialers=2E As the FCC recognizes, a blanket prohibition
on
all abandoned
calls would significantly increase the cost of telemarketing by reducin
g
the efficiency of
every telemarketer's operations=2E Those costs inevitably would be pas

sed
along to
consumers in the form of higher prices=2E We believe the Direct Marketi
ng
Association's
efforts to achieve industry self-regulation on this issue should be
encouraged, and we
support those efforts=2E If the FCC elects to adopt a rule change on t
his
subject, the FCC
should expressly permit telemarketers to abandon a reasonably small
percentage of calls
(such as five per cent) without being considered in violation of the
Telemarketing Sales
Rule=2E

As an alternative to setting a maximum abandonment rate, the Propo
sal
seeks
comment on whether requiring telemarketers who use predictive dialers t
o
also transmit
caller identification information is a feasible option=2E For the reas
ons
given above, we do
not believe that requiring telemarketers to transmit caller ID informat
ion
would be
technically feasible or appropriate=2E

5=2E Answering Machine Detection Restrictions Are Inappropriate

Some telemarketers make use of answering machine detection technol
ogy
("AMD")=2E If used in conjunction with an autodialer or a predictive d
ialer,
AMD can help
prevent a call answered by an answering machine from being transferred
to a
telemarketer=2E For example, an AMD may transfer a call to a telemarke
ter
only if it
detects noise and then silence, such as when a person says "hello," but
not
transfer calls
that are answered by continuous noise, such as when an answering machin
e
answers the
call=2E This process greatly improves the efficiency of telemarketers
but
may result in the
consumer hearing a short period of silence as the call is connected to
a
telemarketer=2E

We do not believe that consumers are frustrated with the use of AM
D,

which
results in only a slight pause (if any) before a telemarketer takes the

line=2E To the extent
consumers may be frustrated by "dead air," we believe that such frustra
tion
is a result of
a small number of telemarketers abusing the use of a predictive dialer
and
abandoning too
many calls=2E In light of the efficiencies created by not connecting
telemarketers to
answering machines, we do not believe that restrictions on the use of A
MD
would be
appropriate=2E To restrict or eliminate the use of AMD would only incr
ease
the cost of
telemarketing with no corresponding benefit provided to consumers=2E

6=2E Calls to Wireless Telephones Do Not Require Additional Regulation

The FCC seeks comment on the extent to which telemarketing to wire
less
telephone consumers exists today and whether revisions to the TCPA are
necessary to
reflect consumers' growing dependence on wireless phones=2E Discover B
ank
does not
"target" wireless telephone numbers for telemarketing calls=2E In fact
, it
is inherently
difficult to distinguish between wireless and ordinary phone numbers=2E

However, if a
consumer has listed his or her wireless telephone number as the number
at
which that
person would like to be called, it is possible that the consumer could
receive a
telemarketing call on the wireless telephone=2E

The FCC has asked whether wireless numbers, or a subset thereof,
should be
considered "residential telephone numbers" under the TCPA Rule, thereby

making calls
to wireless numbers subject to the time of day restrictions and the
company-specific list
requirement=2E We do not believe that such a classification is appropri
ate
or necessary=2E A
wireless phone provides many consumers the flexibility to use their
telephones for a
variety of purposes=2E For example, a consumer may use a wireless phon
e

during the day
for business purposes and use it during the evening and on weekends for
personal
reasons=2E It would not be possible to classify such numbers appropri-
ately
as strictly
"residential" or not=2E Furthermore, we urge the FCC to keep in mind the
context in which
many telemarketers obtain a wireless phone number=2E Telemarketers gen-
erally
call a
wireless phone number because the consumer has listed it as his or her
primary phone
number=2E For this reason, and since telemarketers cannot generally
distinguish between a
wireless and a wireline number, telemarketers generally assume that such
numbers are
"residential telephone numbers" and treat them accordingly, i=2Ee=2E
telemarketers generally
call the number only between 8 a=2Em=2E and 9 p=2Em=2E and apply the
company-specific list
requirements to it=2E

We also note that the use of wireless telephones continues to evolve=2E
Therefore,
the FCC should use caution when reviewing proposed amendments to the TCPA
Rule
that would address wireless telephones=2E Since wireless numbers are
generally not
targeted, and since they usually receive protections as though they were
"residential
telephone numbers," we do not believe that significant benefits can be
obtained by
amending the TCPA Rule to address wireless telephone issues=2E On the
other
hand, since
the wireless telephone marketplace has not yet reached maturity, there
is a
risk that the
FCC could stifle the evolution of mobile commerce or other benefits if
it
made premature
amendments to the TCPA Rule covering wireless telephones=2E

Again, we appreciate the opportunity to comment on these issues=2E
We
would be
pleased to provide any further information you may need regarding these
comments=2E

Respectfully submitted,

Discover Bank

K=2E M=2E Roberts
President